

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0368

GIUSEPPE CUTIETTA)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 01/17/2019
)	
NATIONAL STEEL AND SHIPBUILDING)	
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorney's Fees After Remand and the Order Granting In Part and Denying In Part Claimant's Motion for Modification of Prior Attorney's Fee Orders of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Eric A. Dupree (Dupree Law, APLC), Coronado, California, and Amanda F. Benedict (Law Office of Amanda Benedict), San Diego, California, for claimant.

Roy D. Axelrod (Law Office of Roy Axelrod), San Diego, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Order Awarding Attorney's Fees After Remand and the Order Granting In Part and Denying In Part Claimant's Motion for Modification of Prior Attorney's Fee Orders (2011-LHC-00473) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and

Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained a cumulative traumatic lower back injury over the course of his decades-long work for employer through September 29, 2003. He did not return to his former position as a shipwright after this date, and employer voluntarily paid periods of temporary total and temporary partial disability benefits. A dispute arose regarding claimant's entitlement to benefits, with employer also filing an application for Section 8(f), 33 U.S.C. §908(f), relief.

In his Decision and Order, the administrative law judge awarded claimant compensation for various periods of temporary total, permanent total, and permanent partial disability. He found, however, that claimant forfeited his right to compensation from October 13, 2010 to August 16, 2012, pursuant to Section 8(j), 33 U.S.C. §908(j), as he failed to report his rental earnings during this period. He also found employer entitled to a Section 3(e), 33 U.S.C. §903(e), credit for payments it made to the California Employment Development Department (EDD) in reimbursement for payments the EDD made to claimant, and he denied employer's request for Section 8(f) relief. Pursuant to employer's motion for reconsideration, the administrative law judge modified his finding regarding the period of forfeiture to October 13, 2010 to August 27, 2013. Employer appealed and claimant cross-appealed to the Board.

On August 4, 2014, while the appeals were pending before the Board, claimant's counsel (Dupree or counsel) filed a petition with the administrative law judge, seeking \$116,075 in an attorney's fee and \$13,486.80 in costs incurred between June 16, 2011 and August 4, 2014, while the case was pending before the Office of Administrative Law Judges (OALJ). Employer filed objections on September 22, 2014.

On January 15, 2015, counsel for claimant and employer submitted a joint letter to the administrative law judge, stating they had reached an agreement on the attorney's fee issue. This letter (the January 2015 Agreement or the Agreement) states in pertinent part:

The parties have agreed to the resolution, noted below, in order to avoid prolonged further litigation over the pending petition for attorney fees and costs of Eric Dupree, which may or may [not] be rendered moot depending on the results of Claimant's pending appeal of the case to the BRB.

The parties through their respective counsel agree that NASSCO will pay to Eric Dupree the lump sum of \$46,000.00 to resolve his claimed attorney fees and costs at the OALJ level in the above referenced matter.

However, it has also been agreed that Eric Dupree can revisit his claimed fees following appellate review by the BRB of your Decision and Order, and seek more attorney fees at the OALJ level if he prevails on any of the issues which are currently pending in the appeal to the BRB since the present resolution is based in part on NASSCO's Hensley objections.

It has further been agreed that if Eric Dupree prevails on any of the issues raised in his appeal to the BRB, and later seeks more fees at the OALJ level (based on the prior Hensley objections), NASSCO can pursue its objections for his work at the OALJ level.

Moreover, the parties agree that the present resolution cannot be used by either Eric Dupree or NASSCO in any other cases. Finally, the parties agree that after your order of approval of the above cited agreement and stipulations, NASSCO will promptly pay the attorney fee award to Eric Dupree (within 21 days).

On January 30, 2015, pursuant to the Agreement, the administrative law judge issued a Supplemental Order Awarding Attorney's Fees and Costs, which ordered in pertinent part:

1. Employer shall pay the sum of \$46,000.00 to Eric A. Dupree, Esq., for work performed before the Office of Administrative Law Judges while representing Claimant in this matter;
2. The award to Mr. Dupree shall be without prejudice to his filing another fee petition after the decision of the Benefits Review Board, should the BRB order additional benefits beyond those ordered by me, and/or should additional work before OALJ be required after the BRB's decision;
3. Should Mr. Dupree file an additional fee petition, Employer shall be given the opportunity to file objections thereto.

Supplemental Order at 2 (Jan. 30, 2015).

In a Decision and Order issued on July 8, 2015, the Board reversed the award of a Section 3(e) credit, vacated the administrative law judge's finding that claimant forfeited his right to benefits for various periods under Section 8(j), vacated the denial of Section

8(f) relief, and remanded the case for further consideration. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015). On remand, the administrative law judge found employer is not entitled to Section 8(f) relief, and that claimant did not forfeit benefits for any period under Section 8(j). The administrative law judge therefore awarded claimant permanent partial disability benefits for the period of time previously deemed forfeited, October 13, 2010 through August 27, 2013, which yielded an increase in disability compensation of approximately \$47,444.37.¹

Dupree filed a Supplemental Petition for Attorney's Fees, asking the administrative law judge to reconsider and rule on his original August 2014 Petition, which sought \$116,075 in fees and \$13,486.80 in costs incurred between June 16, 2011 and August 4, 2014, and to consider and rule on his May 2017 supplemental petition for fees, seeking \$7,210 for services rendered and \$48.50 in costs incurred between August 25, 2014 and May 1, 2017. Employer did not respond.

On June 1, 2017, the administrative law judge issued a Supplemental Order Awarding Attorney's Fees After Remand, denying an attorney's fee for all services rendered outside the dates of the case's pendency before the OALJ on remand, August 24, 2016 through February 2, 2017. In so doing, the administrative law judge denied all attorney's fees requested in the August 2014 Petition and all itemized services in the supplemental petition rendered prior to August 24, 2016, which included time spent negotiating the January 2015 Agreement and defending the August 2014 Petition. The administrative law judge explained that these services "should have already been addressed in the prior fee settlement award" approved on January 30, 2015. Order at 2. The administrative law judge found all remaining entries compensable, as the services were rendered on remand. The administrative law judge therefore approved all services counsel billed between February 7 and May 1, 2017, at hourly rates of \$400 for Dupree, \$250 for Myers, and \$150 for paralegal staff.² He denied the requested costs of \$48.50 for printing and copying as overhead and awarded counsel an additional attorney's fee of \$3,180.

On June 16, 2017, counsel filed a "Motion for Reconsideration of Supplemental Order Awarding Attorney's Fees and/or for Modification of Prior Fee Award in Light of Success on Appeal," asking the administrative law judge to address his August 2014 fee

¹ Employer appealed the administrative law judge's denial of Section 8(f) relief, and the Board remanded the case for further consideration of this issue. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, BRB No. 17-0289 (Feb. 6, 2018) (unpub.).

² Specifically, the administrative law judge approved 0.7 hour of Dupree's time (\$280), 11 hours of Myers's time (\$2,750), and 1 hour of paralegal time (\$150).

petition in light of claimant's success before the Board and on remand before the OALJ. Dupree also requested that the administrative law judge reconsider the denial of a fee for defending the fee petition and for negotiating the January 2015 Agreement. Counsel argued that the Agreement was an interim agreement that allowed for a revised fee determination should claimant prevail on his appeal to the Board. On December 1, 2017, the administrative law judge issued an Order giving employer an opportunity to respond to counsel's interpretation of the Agreement by filing a position statement. Employer did not respond.

The administrative law judge issued an Order addressing counsel's motion for reconsideration, reaffirming his denial of an additional attorney's fee for services rendered in the initial OALJ proceedings. He found that the January 2015 Agreement does not permit an additional fee award based on claimant's success on appeal, explaining that the most reasonable reading of the Agreement is that the parties resolved all issues concerning attorney's fees and costs in the initial OALJ proceedings and that Dupree may file a fee petition for work performed in subsequent proceedings if the Board remanded the case. However, the administrative law judge further found that he had erred in disallowing, as work performed before the Board, all time for services performed prior to August 24, 2016, because the Board issued its decision remanding the case on July 8, 2015. The administrative law judge therefore reconsidered counsel's request for a fee for 2.4 hours of services between July 9, 2015 and August 18, 2016, as well as .2 hour of wind-up services on February 5, 2015, for reviewing the administrative law judge's January 2015 fee award. He denied 1.2 hours of Myers's time as clerical³ and found that counsel is entitled to an attorney's fee for 1.2 hours of compensable services rendered between those dates, as well as the .2 hour for wind-up services. The administrative law judge, therefore, awarded counsel an additional \$485 in an attorney's fee.

Counsel appeals the administrative law judge's fee award, asserting that he erred in failing to award an additional fee for work during the initial OALJ proceedings due to claimant's success on appeal and in denying, as clerical, 1.2 hours of Myers's time for

³ The administrative law judge denied the following itemized entries: 0.4 hour on April 7, 2016, to review file, call to OALJ and prepare correspondence to the Board regarding remand status; 0.5 hour on August 17, 2016, for a voicemail to the administrative law judge and calls to the district director and Board regarding the remand and whereabouts of file; and 0.3 hour on August 18, 2016, for review of OALJ voicemail and call from Board regarding file.

services rendered on remand. Employer responds, urging the Board to affirm the fee award. Claimant filed a reply brief.⁴

Initially, we reject counsel's assertion that the administrative law judge erred in denying 1.2 hours of Myers's time for tasks billed on April 7, August 17, and August 18, 2016, after the Board remanded the case. As the administrative law judge permissibly characterized these as clerical services, *see* n.3, *supra*, he was within his discretion to deny the time. *See Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980).

With regard to counsel's assertion of error regarding the meaning of the Agreement, counsel contends the administrative law judge's interpretation is contrary to its plain text, which provides for an interim award of undisputed fees and allows the parties to "adjudicate any additional fees owed under the August 2014 fee petition following the outcome of the appeal."⁵ Cl. Br. at 11. Employer appears to concede that "the parties agreed to an interim attorney fee agreement which would allow [Dupree] to seek additional fees after the BRB issued its Decision." Emp. Br. at 1. We agree with claimant's counsel.

The administrative law judge began his interpretation of the Agreement with the terms of its first provision stating that "NASSCO will pay to Eric Dupree the lump sum of \$46,000.00 to resolve his claimed attorney fees and costs at the OALJ level." He found that "resolve" means the parties no longer wish to litigate the issue and agree to a compromise disposing of the matter and that the first provision, therefore, means that the parties "disposed of all claims for attorney fees and costs incurred while the case was before OALJ the first time." Order on Recon. at 4. With this in mind, the administrative law judge found the Agreement's second provision, stating "However, it has also been agreed that Eric Dupree can revisit his claimed fees following appellate review by the BRB . . . if he prevails on any of the issues which are currently pending in the appeal to the BRB since

⁴ Regarding the May 2017 Supplemental Petition, we affirm, as unchallenged on appeal, the hourly rate awards of \$400 to Dupree, \$250 to Myers, and \$150 to the paralegal staff, and the denial of \$48.50 in overhead costs. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

⁵ We reject employer's assertion that counsel's request for an additional fee for services performed in the initial OALJ proceedings is untimely because he failed to raise the issue in his May 2017 Supplemental Petition. Review of this document reflects that counsel therein requested that: the August 2014 Petition be considered; the fee award reflect substantial success on all issues; and, any increment awarded above the previously awarded \$46,000 be awarded at current rates to account for delay. Supp. Pet. at 2, 6.

the present resolution is based in part on NASSCO's Hensley objections," does not permit reconsideration of the initial fee petition/award based on success on appeal. Rather, the provision allows counsel to "file subsequent attorney's fees petitions for additional time spent before OALJ" in the event the case is remanded. *Id.* at 4-5.

We cannot affirm this interpretation,⁶ as it ignores that the first and second provisions are joined by the term "however" which is used to introduce a statement that contrasts with or seems to contradict what has been stated previously. *See* OED Online, <http://en.oxforddictionaries.com/definition/however> (visited January 4, 2019). Because "however" indicates that the second provision must appear to contradict the first, the administrative law judge erred in interpreting the second provision as consistent with the disposition referenced in the first provision. The administrative law judge thus failed to give the term "revisit" its plain-text meaning, i.e., "to consider (a situation or problem) again or from a different perspective," and defined the phrase "claimed fees" inconsistently from the definition he applied to the same phrase in the Agreement's first provision.⁷ *See* OED Online, <https://en.oxforddictionaries.com/definition/revisit> (visited January 4, 2019). As the Agreement's plain text states that counsel may "revisit" his prior fee petition to seek an additional fee after success on appeal and remand, we vacate the administrative law judge's finding that the Agreement does not allow for reconsideration of counsel's fee for services rendered in the initial OALJ proceedings.⁸ As the administrative law judge did not consider the merits of the August 2014 Petition, we remand the case for consideration of counsel's request for an additional fee for the services itemized therein. *See, e.g.,*

⁶ The administrative law judge must give effect to the parties' mutual intentions as of the time the agreement was executed. *See generally Hale v. BAE Systems San Francisco Ship Repair*, 52 BRBS 57 (2018). Further, as a general rule, stipulations are binding upon those who enter into them. *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104, 107 (1986).

⁷ The administrative law judge interpreted the first reference to "claimed fees" as referring to fees for services rendered in the initial OALJ proceedings. However, he interpreted the second reference to "claimed fees" as referring to fees for services rendered in remand proceedings before the OALJ.

⁸ We additionally note that the administrative law judge's interpretation is inconsistent with his January 2015 Order, wherein he acknowledged that the award of \$46,000 in attorney's fees was to be "without prejudice to [Dupree's] filing another fee petition after the decision of the Benefits Review Board," should the Board increase the award. Fee Award at 2 (Jan. 30, 2015).

Steevens v. Umpqua River Navigation, 35 BRBS 129 (2001); *Jensen v. Weeks Marine*, 33 BRBS 97 (1999); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

On remand, the administrative law judge must address counsel's August 2014 Petition and employer's objections thereto bearing in mind claimant's success on remand and employer's payment of a fee of \$46,000.⁹ With regard to Dupree's Supplemental Petition, the administrative law judge must address the compensability of the services rendered between August 25, 2014 and January 13, 2015, as well as counsel's request that any additional attorney's fee awarded on the August 2014 Petition be augmented to his current hourly rates to account for the delay between the time services were rendered and the fee is awarded.

Accordingly, we vacate the administrative law judge's denial of an additional attorney's fee for services performed in the initial proceeding and we remand the case for further consideration consistent with this decision. In all other respects the administrative law judge's Supplemental Order Awarding Attorney's Fees After Remand and the Order Granting In Part and Denying In Part Claimant's Motion for Modification of Prior Attorney's Fee Orders are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁹ Contrary to the administrative law judge's statement in the Order on Reconsideration at 3-4, n.4, the Agreement does not direct how the prior fee award is to be enhanced or otherwise limit the administrative law judge's authority to address the fee petition and award a reasonable fee.